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RECENT DECISIONS.

JEROME MICHAEL, *Editor-in-Charge.*

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CONTRACTS—INSTALMENT CONTRACT—REPUDIATION AFTER BREACH BY THE OTHER PARTY.—The defendant contracted to deliver goods to the plaintiff as ordered, payment to be made on the fifth of each month for deliveries in the preceding month. Upon the defendant's failure to deliver part of the goods ordered, the plaintiff withheld payment, and thereupon the defendant repudiated the contract. *Held*, since the plaintiff's default was equivalent to a rescission, the defendant was justified in abandoning the contract. *McFarlan Carriage Co. v. Connersville Wagon Co.* (Ind. 1911) 96 N. E. 400.

Even when the promises of a contract are independent in form, they will often be construed as conditional, in order to work out justice between the parties. Langdell, *Contracts*, § 106. Thus, a condition is implied that each party shall start with faithful performance, and upon a breach *in limine* of an instalment contract the other party may therefore abandon the contract, *Honck v. Muller* (1881) L. R. 7 Q. B. D. 92; *Norrington v. Wright* (1885) 115 U. S. 188, although sometimes such a contract is apparently erroneously construed as a series of independent obligations. *Simpson v. Crippin* (1872) L. R. 8 Q. B. 14; *Gerli v. Poidebard Silk Mfg. Co.* (1894) 57 N. J. L. 432. But when partial performance has rendered it impossible to restore the *statu quo*, the courts are reluctant to hold subsequent performance by one party conditioned upon the prior performance by the other of a single instalment, *Mersey Steel Co. v. Naylor* (1884) L. R. 9 A. C. 434, and a default by one party should not justify the other in repudiating the contract, *Freeth v. Burr* (1874) L. R. 9 C. P. 208; *West v. Bechtel* (1900) 125 Mich. 144, unless it goes to the essence of the contract, *Hess v. Dawson* (1894) 149 Ill. 138; *Bradford v. Williams* (1872) L. R. 7 Exch. 259, or unless the conduct of the party in default be such as to evince an intention to abandon the contract. *Blackburn v. Reilly* (1885) 47 N. J. L. 290; *Withers v. Reynolds* (1831) 2 B. & Ad. 882. While it is difficult to support the court's interpretation of the plaintiff's failure to pay as evincing an intention to abandon the contract, it would seem to be a breach going to the root of the contract and therefore a justification for the defendant's action in repudiating it. See 1 COLUMBIA LAW REVIEW 317.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE AND FEDERAL POWER.—An action was brought under a State statute for a penalty for the failure of the defendant railroad to accept goods for shipment beyond its own line into another State. *Held*, the statute was unconstitutional. *Southern R. R. v. Reid* (Sup. Ct. of U. S., Jan. 9, 1912). Not yet reported.

For a discussion of this case as decided in the lower court, see 11 COLUMBIA LAW REVIEW 284.

CORPORATIONS—DECLARATION OF UNLAWFUL DIVIDENDS—LIABILITY OF DIRECTORS TO INVESTORS IN DECEIT.—A complaint alleged that the defendant directors knowingly declared a dividend in violation of a

statute which provided that dividends should be declared only out of profits, and caused a notice thereof to be published in order to induce the public to purchase stock, and that the plaintiffs in reliance thereon became stockholders. *Held*, no cause of action was stated. *Ottinger v. Bennett* (N. Y. 1911) 144 App. Div. 525, reversed in 203 N. Y. 28.

Directors and other corporate officers, *Ward v. Trimble* (1898) 103 Ky. 153, as well as the corporation itself, *Benedict v. Guardian Trust Co.* (N. Y. 1904) 91 App. Div. 103; but see *Kennedy v. McKay* (1881) 43 N. J. L. 288, are liable in deceit for knowingly making false statements of fact in regard to the profits or financial condition of the corporation, to one who has been misled by such misrepresentation. *Morgan v. Skiddy* (1875) 62 N. Y. 319; see 11 COLUMBIA LAW REVIEW 376. It is elementary, however, that it is not essential to a cause of action in deceit that the fraudulent misrepresentations take the form of false statements. *Hinkley v. Oil Co.* (1906) 132 Ia. 396. Thus, the silence of corporate directors may under certain circumstances subject them to tort liability. 2 COLUMBIA LAW REVIEW 498. So, too, a half-truth, see *Lomerson v. Johnston* (1890) 47 N. J. Eq. 312, or any conduct which is intended to create a false impression upon the minds of others, is equally reprehensible. *Stewart v. Wyoming Co.* (1888) 128 U. S. 383; *March v. First National Bank* (N. Y. 1875) 4 Hun 466. There is accordingly no reason why the defendants in the principal case should not be chargeable with the consequences of their misleading acts, as the other elements of deceit were present. Since an act will be given its ordinary legal and customary significance, *Clark v. Edgar* (1884) 84 Mo. 106; *Second Nat. Bank v. Curtiss* (N. Y. 1896) 2 App. Div. 508, the declaration of the dividend was clearly a representation that the company was legally entitled to make it, and that profits had been earned. It is unimportant that the misrepresentation was not made directly to the plaintiff, since he was one of the public or class intended to be reached. *Eaton Co. v. Avery* (1880) 83 N. Y. 31; *Morgan v. Skiddy supra*.

CORPORATIONS—RIGHT OF CREDITORS AGAINST STOCKHOLDERS—DEFENSE OF ULTRA VIRES.—The plaintiff obtained judgment against a corporation on an executed contract, but it was returned unsatisfied. He then sought to proceed against the stockholders under a statute making them liable to creditors for unpaid stock subscriptions, and imposing upon them an additional liability. *Held*, the plaintiff had no cause of action. *Leighton v. Leighton Lee Ass'n* (N. Y. 1911) 131 N. Y. Supp. 561.

At common law unpaid stock subscriptions are corporate assets which a creditor can reach in equity by subrogation to the rights of the corporation, 1 Cook, Corporations, (6th ed.) § 204, and judgment against the corporation generally concludes the subscriber. *Frost v. St. Paul Co.* (1894) 57 Minn. 325. In most jurisdictions not only may the party who has performed an *ultra vires* contract recover against the corporation, *Dewey v. Ry. Co.* (1892) 91 Mich. 351, but the corporation may still collect its unpaid stock subscriptions, *Hannibal Road Co. v. Menefee* (1857) 25 Mo. 547, unless its *ultra vires* acts amount to an abandonment of the purposes of its charter. 1 Machen, Corporations, § 258. *Ultra vires* should therefore be no defence to a creditor's action for unpaid stock subscriptions. As to the additional statutory liability also, a judgment against the corporation generally concludes the stock-

holders. *Holland v. Duluth Iron Co.* (1896) 65 Minn. 324. This result is often reached on the theory that the stockholder has been represented in the previous suit by the corporation, *Baines v. Babcock* (1892) 95 Cal. 581, and this is clearly true where the stockholders are deemed to contract directly with the creditors. *Kennedy v. Cal. Savings Bank* (1892) 97 Cal. 93. But where the statutory liability is considered as an obligation imposed by law, *Marshall v. Sherman* (1895) 148 N. Y. 9, the statute is sometimes construed, as in the principal case, to exclude liability for *ultra vires* transactions. *Ward v. Joslin* (1902) 186 U. S. 142. Whether a stockholder will be concluded by a judgment against the corporation in the case of statutes which make them directly liable to the creditors for their unpaid subscriptions, should depend upon which of the above views of statutory liability obtains in a given jurisdiction. Under the New York construction, *ultra vires* would therefore seem to be a defence.

CORPORATIONS—STOCKHOLDERS—INDIVIDUAL RESPONSIBILITY.—In a suit against a corporation of small financial responsibility, for an accounting and an injunction restraining the infringement of a patent, the stockholders were joined as defendants. *Held*, they were proper parties. *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. et al.* (C. C. E. D. N. Y. 1911) 190 Fed. 323.

Since the injunction against a corporation binds all of its members, *Hutter v. Stopper Co.* (1904) 128 Fed. 283; *Glucose Co. v. St. Louis Co.* (1905) 135 Fed. 540, and only those who receive profits must account for them, *Linotype Co. v. Ridder* (1895) 65 Fed. 853, the officers and directors are generally not proper parties defendant in such actions against solvent corporations. It does not follow from this that actual participants in corporate torts are immune from liability, 5 COLUMBIA LAW REVIEW 615; *Peters v. Biscuit Co.* (1903) 120 Fed. 679, and corporate officers are subject to the general rule that an agent is responsible for torts committed on behalf of his employer. *Graham v. Earl* (1897) 92 Fed. 155. See note to *Nunnally v. Iron Co.* (Tenn. 1895) 28 L. R. A. 421. Although a director of a corporation is not personally liable for acts in which he took no affirmative part, *Nickel Co. v. Worthington* (1882) 13 Fed. 392, yet he is liable for any wrong which he authorized. *Cash Register Co. v. Leland* (1899) 94 Fed. 502. Although it is obvious that this personal liability would seldom attach to the stockholders, they cannot secure immunity by creating an irresponsible corporation through which to obtain profits, *Crown Cork Co. v. Brooklyn Bottle Co.* (1909) 172 Fed. 225, or a sham corporation to perform their wrongs, *Brundred v. Rice* (1892) 49 Oh. St. 640. In the principal case, therefore, even if the stockholders had not authorized the infringement so as to be liable in damages, they were properly required to account for profits.

COPYRIGHT—RIGHT OF DRAMATIZATION—INFRINGEMENT BY MOVING PICTURES.—The plaintiffs were the sole owners of the copyright of a book. The defendants, makers of moving picture films, offered for sale pictures based on the story of the book, without the permission of the plaintiffs, who asked for an injunction to restrain the infringement of their copyright. *Held*, the injunction should be granted. *Kalem Co. v. Harper Bros. et al.* (1911) 32 Sup. Ct. Rep. 20.

For a discussion of the principles involved see 9 COLUMBIA LAW REVIEW 549.

CRIMINAL LAW—WAIVER OF RIGHTS BY ACCUSED.—The accused in a trial for murder agreed, by consent of the court, that the verdict should be received by a designated attorney in the absence of the judge. *Held*, the waiver of his presence was not reversible error. *State v. Keehn* (Kan. 1911) 118 Pac. 851. See Notes, p. 163.

DEEDS—RESTRICTIVE AGREEMENTS—PERSONS ENTITLED TO ENFORCE.—The owner of a tract of land which was laid out in lots, conveyed portions of it subject to similar restrictions for the benefit of the whole. By mesne conveyances the plaintiff became the owner of the parcel first conveyed and the defendant the owner of a second. An action was brought in equity to enforce the restrictions. *Held*, the plaintiff's admitted right to relief was barred by his own violation of the restrictions. *Coates v. Cullingford* (1911) 131 N. Y. Supp. 700. See Notes, p. 158.

EMINENT DOMAIN—WHAT CONSTITUTES TAKING OF PROPERTY.—The plaintiff purchased a house and lot abutting on a street, over which the defendant operated a track then used exclusively for switching. A subsequent increased use of the track was alleged to be peculiarly injurious to the plaintiff's property, greatly decreasing it in value. *Held*, the plaintiff's allegations if true entitled him to damages. *Badouh v. St. Louis B. & M. Ry. Co.* (Tex. 1911) 140 S. W. 354. See Notes, p. 165.

EQUITY—INTERPLEADER—INDEPENDENT LIABILITY.—A bank brought a bill in equity to interplead a depositor's administrator with an adverse claimant under a paramount title. *Held*, because of the bank's contractual liability to its depositor, relief could not be given. *Runkle's Adm'r v. Runkle's Adm'r* (Va. 1911) 72 S. E. 695.

Since a decree of interpleader extinguishes the complainant's interest in the controversy, *Anon.* (1685) 1 Vern. 351, he must be a mere stakeholder under no independent liability with reference to the *res* to either of those whom he seeks to interplead, if they claim under paramount titles, whether the obligation results from the relation between them or from an independent transaction. 4 Pomeroy, Eq. Jur., (3rd ed.) § 1325; *Cochran v. O'Brien* (1845) 8 Ir. Eq. 241; *Crawshay v. Thornton* (1837) 2 M. & C. 1. This strict rule was followed by the English courts of law in giving in a pending suit the summary relief provided by statute, *Patarni v. Campbell* (1843) 12 M. & W. 277; *Lindsay v. Barron* (1848) 6 C. B. 291, until a second statute enabled them to decree an interpleader in such cases without injustice, *Attenborough v. St. Katherine's Dock Co.* (1878) L. R. 3 C. P. D. 450, by preserving unimpaired the collateral liability of the complainant to either of the claimants. *In re Mersey Docks* L. R. [1899] 1 Q. B. D. 546. In this country similar relief at law in pending suits is generally afforded by statute. MacLennan, Interpleader, 156; *Wells v. Corn Exch. Bank* (N. Y. 1904) 43 Misc. 377. Moreover, because of the fact that under modern commercial conditions the complainant is usually not a mere stakeholder, there is a tendency on the part of the courts of equity to relax the more rigid rule, MacLennan, Interpleader, 156; *Bechtel v. Sheaffer* (1888) 117 Pa. 555, and to grant relief where the complainant's liability arises solely from the fact that he bears to one of the claimants a peculiar relation, such as that of bailee, *Byers v. Sansom-Thayer Co.* (1904) 111 Ill. App. 575, or

depositee. *City Bank v. Skelton* (1846) 2 Blatch. 14; *Platte Bank v. National Bank* (1895) 155 Ill. 250; *contra*, *Bank v. Lumber Co.* (1882) 132 Mass. 410. Nevertheless, the decision under discussion is in accord with the weight of authority. *Kyle v. Coal Co.* (1896) 112 Ala. 606.

EVIDENCE—LIBEL AND SLANDER—ABANDONED PLEA OF JUSTIFICATION AS EVIDENCE OF MALICE.—In an action of libel the defendant filed a plea of justification, but subsequently withdrew it by leave of the court. *Held*, the plaintiff might put this plea in evidence as bearing on the question of malice. *Ruskin v. Armn* (N. J. 1911) 81 Atl. 342.

While an unsustained plea of justification has been held to go to the aggravation of damages as a matter of law, *Gorman v. Sutton* (1858) 32 Pa. 247, it has also been decided that such a plea may not receive any consideration, *Shoulty v. Müller* (1849) 1 Ind. 544, and that when it is withdrawn before trial, *Gilmore v. Borders* (Miss. 1838) 2 How. 824, or is fatally defective in form, *Braden v. Walker* (Tenn. 1847) 8 Humph. 34, and see *Shirley v. Keathy* (Tenn. 1867) 4 Cold. 29, it is no longer part of the proceedings for any purpose. Discarding these opposing extreme views, the preferable doctrine, now obtaining in most jurisdictions, is that while such a plea does not enhance the damages as a matter of law, it may properly be considered by the jury as evidence of the defendant's malice in making the original publication. *Holmes v. Jones* (1890) 121 N. Y. 641; *Simpson v. Robinson* (1848) 12 Ad. & E. [N. S.] 511; *Pallet v. Sargent* (1858) 36 N. H. 496. It is, however, obviously analogous to a conditionally privileged communication, in that it has no evidentiary weight if it prove to have been interposed in good faith. But see *Fodor v. Fuchs* (1910) 79 N. J. L. 529. On the other hand, the defendant is not precluded by such a plea from obtaining a mitigation of damages, *Aird v. Fireman's Journal Co.* (N. Y. 1881) 10 Daly 254; *Pallet v. Sargent supra*; *contra*, *Alderman v. French* (Mass. 1822) 1 Pick. 1, and even the facts proved in support thereof may be used for that purpose. *Ransone v. Christian* (1873) 49 Ga. 491; *Kennedy v. Holborn* (1863) 16 Wis. 481. Although the withdrawal of the plea is not necessarily a concession of the falsity of the publication or an admission of malice, yet it clearly is a reiteration of a charge whose truth has not been proved; and by the better view any words, whenever uttered and whether actionable or not, are competent evidence to prove *animus*, under instructions to the jury not to award damages on them as though sued on. 11 COLUMBIA LAW REVIEW 375.

EVIDENCE—LIBEL AND SLANDER—SPECIFIC ACTS OF MISCONDUCT.—In an action for libel charging adultery, the defendant sought to introduce in reduction of damages evidence of the truth of another part of the publication, not alleged in the complaint, charging the plaintiff with cruelty toward his wife. *Held*, two judges dissenting, the evidence was admissible. *Osterheld v. Star Co.* (N. Y. 1911) 131 N. Y. Supp. 247.

In an action of libel where injury to reputation, instead of to character, is the gist of the tort, evidence of specific acts of misconduct on the part of the plaintiff is irrelevant, *Scott v. Sampson* (1882) L. R. 8 Q. B. D. 491; 1 Wigmore, Evidence, § 209, and is held in New York as elsewhere to be inadmissible. *Root v. King* (N. Y. 1827) 7 Cow. 613, 635; *Cudlip v. N. Y. Evening Journal Pub. Co.* (1904) 180

N. Y. 85. But since such evidence is concededly admissible in actions of seduction, criminal conversation, and indecent assault, as directly bearing upon the amount of mental anguish suffered by the plaintiff, 1 Wigmore, Evidence, §§ 210, 211, 212, it is argued in the principal case that the same rule should apply to actions of defamation, where mental suffering is also an element of compensatory damages. *Van Ingen v. Star Co.* (N. Y. 1896) 1 App. Div. 429, aff'd 157 N. Y. 695. Such a theory, it is submitted, would tend to abrogate entirely the long established rule of evidence given above, and though never before adopted by the courts, it has been condemned in advance by high authority. 1 Wigmore, Evidence, § 209. Since it has been repeatedly held that prior or concurrent publications in other newspapers of the same or other libels are inadmissible in mitigation of damages, *Palmer v. New York News Pub. Co.* (N. Y. 1898) 31 App. Div. 210; *Palmer v. Matthews* (1900) 162 N. Y. 100, there seems to be no reason for receiving in evidence another charge contained in the same publication, *Fisher v. Patterson* (1846) 14 Oh. 418, unless it relates to the same subject-matter as the particular libel in question, and has been incorporated by the plaintiff in his complaint. *Holmes v. Jones* (1895) 147 N. Y. 59. The principal case, therefore, in reaching a contrary result, has gone further than any of the authorities of its jurisdiction.

EXECUTORS AND ADMINISTRATORS—RELATION TO CREDITORS—UNMATURED CLAIMS.—After the administrator had refused to pay notes of his intestate which had several years to run, the holder brought an action in equity to have the notes declared valid and property set aside for their payment on maturity. *Held*, since the defendant was a trustee, the complaint stated a cause of action. *Banker's Surety Co. v. Meyer et al.* (N. Y. 1911) 46 N. Y. L. J. No. 53.

The executor, like the *haeres* of the civil law, took originally in a beneficial rather than in a fiduciary character, *Bowker v. Hunter* (1783) 1 Brown Ch. 328; *Att'y-gen'l v. Hooker* (1725) 2 P. Wms. 338, and while bound to pay legacies and debts held the residue in his own right. Wentworth, Executors, (Curson ed.) 4. Probably this fact, together with the original jurisdiction of the ecclesiastical courts, which was later assumed by the courts of equity, *Howard v. Howard* (1682) 1 Vern. 134, over the administration of wills, gave rise to the distinctions which still obtain between executors and trustees in spite of the similarity of their positions. *In Re Marsden* (1884) L. R. 26 Ch. D. 783. Thus, though personal property be devised expressly for the payment of debts, the executor is not regarded as a trustee within the meaning of the Statute of Limitations, *Scott v. Jones* (1838) 4 C. & F. 382; see *In Re Lacy* L. R. [1899] 2 Ch. 149, and a legacy in his hands is not entitled to the exemption from a creditor's bill accorded a trust fund by statute. *Bacon v. Bonham* (1876) 27 N. J. Eq. 209. While executors are deemed to be trustees for certain purposes under statutes existing in New York, *Babcock v. Booth* (N. Y. 1842) 2 Hill 181, the principal case effects a material change in their status, and is an interesting example of equity's power to furnish a remedy where none would otherwise exist.

FUTURE ESTATES—VESTED REMAINDERS IN NEW YORK—ALIENABILITY.—The plaintiff sought to revoke a deed of trust containing a limitation, in default of surviving wife and children and after various intermediate life estates, to the persons who at the termination of the trust

might be the plaintiff's next of kin. The defendants, presumptive next of kin, contended that their consent was essential under a statute requiring the consent of all persons "beneficially interested." *Held*, the interest of the defendants was neither devisable, descendible nor alienable, and was therefore not a beneficial interest. *Robinson v. New York Life Ins. Co.* (N. Y. 1911) 46 N. Y. L. J. No. 75.

While the next of kin are, as a general rule, to be ascertained at the death of the person whose next of kin are referred to, 2 Redfield, Wills, (3rd ed.) 89; *Gundry v. Pinniger* (1851) 14 Beav. 94, they will be ascertained at the time of distribution where, as in the principal case, the grantor clearly so intended. Hawkins, Wills, (Amer. ed.) 101; *Pinder v. Pinder* (1860) 28 Beav. 44. Inasmuch, however, as the defendants are the persons *in esse* who, if the intervening life estates were to cease *eo instanti*, would answer to the description of next of kin, it would seem that they have vested remainders in New York by statute. *Moore v. Littell* (1869) 41 N. Y. 66; Huntington, Vested Remainders in New York, 9 COLUMBIA LAW REVIEW 687. Since such remainders are subject to be divested by death before the time of enjoyment, they are neither devisable nor descendible. *Dougherty v. Thompson* (1901) 167 N. Y. 472. While they present the anomaly of vested interests which are not absolutely alienable, Fowler, Real Property Law, (3rd ed.) 249; *Wilber v. Wilber* (N. Y. 1899) 45 App. Div. 158, they may nevertheless be conveyed so as to pass a title defeasible upon the happening of the condition subsequent above mentioned, *Merolla v. Lane* (N. Y. 1907) 122 App. Div. 535; *Harris v. Strodl* (1892) 132 N. Y. 392, and subject to open to let in after born members of the same class. *Moore v. Littell supra*; *Kent v. Church of St. Michael* (1892) 136 N. Y. 10, 17. It would seem, therefore, that they constitute a beneficial interest. The conclusion reached in this and similar cases, *In re Wetmore* (1901) 108 Fed. 520, that there can be no next of kin of a living person, and that the presumptive next of kin have therefore a mere possibility, while sound on common law principles, apparently repudiates the reasoning in *Moore v. Littell supra*.

HUSBAND AND WIFE—ACTION FOR SEPARATION—RECONCILIATION—LIABILITY OF HUSBAND FOR COUNSEL FEES.—After dismissing an action for separate maintenance upon the plaintiff's reconciliation with her husband, the court ordered the latter to pay his wife's counsel fees. *Held*, since reconciliation does not bar an attorney's right to compensation, the order was correct. *Kiddle v. Kiddle* (Neb. 1911) 133 N. W. 181.

The English courts hold that if reasonable cause be shown, an attorney may bring suit against the husband for services rendered his wife in a divorce action, on the ground that they are necessities for which he is liable. 2 Bishop, Mar., Div. & Sep., § 973; *Brown v. Ackroyd* (1856) 5 E. & B. 819. In this country they are not so regarded by the weight of authority, and recovery is accordingly denied. *Clarke v. Burke* (1886) 65 Wis. 359; *Coffin v. Dunham* (Mass. 1851) 8 Cush. 404; *contra*, *Preston v. Johnson* (1884) 65 Ia. 285. In most States, however, statutes have been passed empowering the court, during the pendency of the action, to award to the wife the expenses of litigation, so that her interests may be adequately guarded. Such statutes are generally construed to make the attorney's right to remuneration, for services rendered the wife, ancillary to the divorce suit and discretionary with the court. A separate action against the

husband is therefore impossible. *Yeiser v. Lowe* (1897) 50 Neb. 310; *Zent v. Sullivan* (1907) 47 Wash. 315. The courts will nevertheless fully protect the counsel of the wife, and the husband will ordinarily be ordered to compensate him for services rendered prior to a reconciliation of the parties, if the suit was instituted on reasonable grounds, *Courtney v. Courtney* (1891) 4 Ind. App. 221; *Fullhart v. Fullhart* (1904) 109 Mo. App. 705, except in a few jurisdictions where the less liberal rule obtains, that the husband may be commanded to pay only the future expenses of his wife. *Beadleston v. Beadleston* (1886) 103 N. Y. 402; *Reynolds v. Reynolds* (1885) 67 Cal. 176.

INTERSTATE COMMERCE—FEDERAL SAFETY-APPLIANCE ACT—INCIDENTAL REGULATION OF INTRASTATE COMMERCE.—Congress by the Act of March 2, 1903, (32 Stat. at L. 943, c. 976), extended the requirements of the safety-appliance acts to "all trains, locomotives, cars and similar vehicles used on any railroad engaged in interstate commerce." *Held*, the Act is constitutional. *Southern Ry. v. U. S.* (1911) 32 Sup. Ct. Rep. 2.

While the power of Congress is restricted to the regulation of commerce among the several States, *Trade Mark Cases* (1879) 100 U. S. 82, 96, in that field its authority is plenary, see *Gibbons v. Ogden* (1824) 9 Wheat 1, 196; *Employers' Liability Cases* (1908) 207 U. S. 463, 493, and for that purpose it may make all necessary laws. *Lottery Case* (1903) 188 U. S. 321, 352. Therefore, the instrumentalities employed in intrastate commerce may be regulated as well as those used in interstate commerce, if there is such a substantial relation between the regulation of the former agencies and the safety of interstate traffic and the persons engaged in its movement. This principle is embodied in the Statute under discussion, the provisions of which extend to cars that are intended only for use in intrastate commerce and which are in fact used solely to transport articles of commerce originating in and consigned to points within the same State. The decision upholding the Act recognizes that the power of Congress over interstate commerce is very broad, and it exhibits a liberal attitude toward legislation designed to effectuate this power although it incidentally affects intrastate commerce to a large degree. *Cf. Employers' Liability Cases supra*, 497, 498, 502; *Adair v. U. S.* (1908) 208 U. S. 161; *R. G. S. R. R. Co. v. Campbell* (1908) 44 Colo. 1.

LIBEL AND SLANDER—AMBIGUOUS WORDS—INTENTION TO DEFAME AS AN ELEMENT OF SLANDER.—The defendant accused the plaintiff of "taking" certain cotton. In an action for slander the jury were instructed to find for the defendant unless he intended to charge the plaintiff with larceny. *Held*, the instructions were correct. *McCall v. Sustair* (N. C. 1911) 72 S. E. 974.

When the defendant is accused of slander his liability depends on the effect of his words upon the minds of others, and his mental state is irrelevant unless he pleads a qualified privilege, *Harwood v. Keech* (N. Y. 1895) 6 Thomp. & C. 665, except as bearing upon the question of damages. *Nailor v. Ponder* (Del. 1895) 1 Marv. 408; *Weaver v. Hendrick* (1860) 30 Mo. 502. Thus his good faith will not furnish a legal excuse, *Dunlevy v. Wolferman* (1904) 106 Mo. App. 46, since malice is either declared unessential or is presumed from the fact of utterance. *Jellison v. Goodwin* (1857) 43 Me. 287; see *Prince v. Brooklyn Eagle* (N. Y. 1896) 16 Misc. 186. Furthermore, the defend-

ant cannot plead the lack of an intent to defame as a defence, and he is therefore liable though he used the words while intoxicated, *Reed v. Harper* (1868) 25 Ia. 87, or as a jest, *Hatch v. Potter* (Ill. 1845) 7 Gil. 725, unless his auditors so understood them. On the other hand, the defendant is not chargeable with slander, if his words, although in themselves imputing crime, were obviously used as epithets, *Haynes v. Haynes* (1848) 29 Me. 247, or were robbed of their apparent slanderous character by facts known to his hearers. *Carmichael v. Shiel* (1863) 21 Ind. 661. So when the language in question is ambiguous the same test should be applied, and it should be deemed slanderous if under all the circumstances it would naturally be thus understood. *De Moss v. Haycock* (1863) 15 Ia. 149. The contrary doctrine of the principal case is opposed to the weight of authority, *Hamlin v. Fanti* (1903) 118 Wis. 594; *Short v. Acton* (1904) 33 Ind. App. 361; *Williams v. McKee* (1897) 98 Tenn. 139, although it does not stand alone, *McKee v. Ingalls* (1842) 5 Ill. 30; *Lucas v. Nichols* (N. C. 1859) 7 Jones L. 33, and seems a questionable relaxation of the law of defamation.

MALICIOUS PROSECUTION—ADVICE OF COUNSEL AS A DEFENSE.—In an action of malicious prosecution, the defendant pleaded that he acted upon the *bona fide* advice of the prosecuting attorney. *Held*, this was a complete defense. *Price Mercantile Co. v. Cuilla* (Ark. 1911) 141 S. W. 194.

Advice of counsel, when fairly obtained and honestly acted upon, is held in most jurisdictions to be conclusive evidence of probable cause, and therefore a complete defense, regardless of malice. *Stewart v. Sonneborn* (1878) 98 U. S. 187; *Cooper v. Flemming* (1904) 114 Tenn. 40; *Besson v. Southard* (1851) 10 N. Y. 236. In others, the same result has been reached by holding as a matter of law that it negatives any malice which might be inferred from want of probable cause, *Soule v. Winslow* (1876) 66 Me. 447; *Lipowicz v. Jervis* (1904) 209 Pa. 315, since both elements are necessary to maintain the action. *Burdick, Torts*, 249. In a few States, however, it is considered relevant only as a fact for the jury, *Parr v. Loder* (N. Y. 1904) 97 App. Div. 218, tending to prove the absence of malice. *Hazzard v. Flury* (1890) 120 N. Y. 223; *Ramsey v. Arrott* (1885) 64 Tex. 320; *Smith v. Eastern Bldg. & Loan Ass'n* (1895) 116 N. C. 73. The rule of the majority is based upon wise considerations of public policy which permit occasional hardship in order to encourage frequent and untrammelled appeals to the courts. *Burdick, Torts*, 255, 256. Where the counsel whose advice is relied on is a public prosecutor, as in the principal case, the danger of collusion between attorney and client is lessened, *Sebastian v. Cheney* (1894) 86 Tex. 497, and the above reasoning applies with even greater force. *Johnson v. Miller* (Ia. 1886) 29 N. W. 743; *Kirk v. Wiener-Loeb Laundry Co.* (1908) 120 La. 820. It is interesting to note that at least one jurisdiction which denies the defense where the advice is given by a private attorney, allows it where it is that of a public one. *Sebastian v. Cheney supra*; see also *Dennis v. Ryan* (1875) 65 N. Y. 385.

MANDAMUS—ANTICIPATED BREACH OF DUTY.—The railroad commission ordered the defendants to connect their tracks within ninety days. After the defendants expressed their determination not to do so, the commissioners applied for mandamus, before the expiration of the

time for compliance with the order. *Held*, the action was not premature. *State ex rel. Dawson v. C. B. & Q. R. R. Co. et al.* (Kan. 1911) 118 Pac. 872.

It is generally said that mandamus will not lie for an anticipated breach of duty, *Tapping, Mandamus*, 63; *High, Extraordinary Legal Remedies*, (3rd ed.) § 12; *State ex rel. Price v. Carney* (1864) 3 Kan. 88. Nor will it lie when its purpose can no longer be accomplished. *People ex rel. Bailey v. Supervisors* (N. Y. 1851) 12 Barb. 217. It follows that, where the above rules are rigorously applied, duties which are required to be performed at a time certain, and which, owing to their peculiar nature, cannot be performed subsequently, are not enforceable by mandamus. *State ex rel. Price v. Carney supra*; *Zanesville v. Richards* (1855) 5 Oh. St. 589; *State ex rel. Piper v. Gracey* (1876) 11 Nev. 223, 236; *School Comm'rs v. County Comm'rs* (1863) 20 Md. 449, 460. It is doubtful whether this restriction was ever judicially recognized in England, see *Attorney-general v. Boston* (1877) 123 Mass. 460, and the better view seems to be that the writ may be granted in the discretion of the court in anticipation of a breach of duty where such a breach would otherwise be irremediable, *The King v. Milverton* (1835) 3 Ad. & E. 284, or even where it would merely cause needless inconvenience. *Attorney-general v. Boston supra*; *Pass Christian v. Murphy* (1890) 68 Miss. 84. The refusal to perform may be manifested by words, *Pass Christian v. Murphy supra*, or by acts indicating an intention to disregard the duty. *C. K. & W. R. R. Co. v. Comm'rs* (1892) 49 Kan. 399, 413. The court in the principal case seems to have interpreted its statute, which provides for mandamus in case of an omission of duty, in accord with the sounder view of the common law rule.

MORTGAGES—ASSIGNMENT—ASSIGNMENT OF NOTE AND MORTGAGE.—The defendant gave a chattel mortgage to the plaintiff and then fraudulently mortgaged the same property to one Magurk as security for a promissory note. Magurk, who had notice of the prior mortgage, recorded her mortgage before the first mortgage was recorded and then assigned to the defendant Reis. *Held*, Reis took only the rights of his assignor, and therefore took subject to the plaintiff's right of which his assignor had notice. *Henry Elias Brewing Co. v. Boeger* (N. Y. 1911) 46 N. Y. L. J. No. 65. See Notes, p. 152.

MORTGAGES—DEEDS OF TRUST—METHOD OF FORECLOSURE.—The plaintiff sought to foreclose an unconditional trust deed given him by the defendant and conferring upon him the power to sell the property immediately and to pay certain debts of the defendant with the proceeds. The defendant contended that he was entitled to have the land sold without foreclosure proceedings. *Held*, the trust deed was a mortgage and could be foreclosed only by action. *Fiske v. Mayhew et al.* (Neb. 1911) 133 N. W. 195.

While unconditioned trust deeds executed to raise funds to pay the grantor's debts operate as absolute conveyances, 3 Pomeroy, Eq. Jur., (3rd ed.) § 1018; *Sandusky v. Faris* (1901) 49 W. Va. 150, courts of equity will treat such instruments, as well as deeds absolute in form, as mortgages when given as security. *Shillaber v. Robinson* (1877) 97 U. S. 68; *McLane v. Paschal* (1877) 47 Tex. 365. Since the court found that the instrument in question was given for the latter purpose, it

was properly treated as a mortgage although it contained no defeasance clause. *National Bank v. Lovenberg* (1885) 63 Tex. 506; *Cooper v. Brock* (1879) 41 Mich. 488. The validity of powers of sale is seldom denied and the mortgage may be foreclosed without judicial aid upon the fundamental principle that parties may make such legal contracts as they choose. *Elliott v. Wood* (1871) 45 N. Y. 71; *Dibrell v. Carlisle* (1873) 48 Miss. 691; *Very v. Russell* (1874) 65 N. H. 646. This method of foreclosure should therefore be possible under the trust deed given in the principal case, especially since the objection sometimes urged against this procedure in the case of technical mortgages, that the mortgagee is thus made both a trustee and an interested party, loses all force when the power is contained in a deed of trust given to a third party. *Bloom v. Van Rensselaer* (1854) 15 Ill. 503; *Taylor v. Stearns* (Va. 1868) 18 Gratt. 244. Since this remedy is merely cumulative, *Dupee v. Rose* (1894) 10 Utah 305; *Morrison v. Bean* (1855) 15 Tex. 266, and since the mortgagee or trustee therefore has the option to proceed by action, *Cormerais v. Genella* (1863) 22 Cal. 116; 2 Jones, Mortgages, § 1773, judicial foreclosure was nevertheless properly allowed in the principle case.

NEGOTIABLE INSTRUMENTS—CHECKS—IDENTITY OF PAYEE.—The defendant drew checks to the order of certain persons by their names and official titles, and forwarded them by mail to an impostor who obtained payment by forged indorsements. *Held*, two judges dissenting, the defendant was not required to determine the identity of the payees, and was therefore not liable for the loss. *Mercantile Nat'l Bank of N. Y. v. Silverman* (N. Y. 1912) 46 N. Y. L. J. No. 79.

It is a general rule that when goods are sold by correspondence presumably to a third party whom an impostor is impersonating, the impostor gets no title. *Cundy v. Lindsay* (1878) L. R. 3 A. C. 459; *Newberry v. Norfolk etc. Ry. Co.* (1903) 133 N. C. 45. The contrary would seem to be the rule, however, when no such third party exists and the impostor gives a purely fictitious name, for here the analogy is very close to the case of a sale and delivery after personal identification of the vendee by the vendor. *Edmunds v. Merchants Trans. Co.* (1883) 135 Mass. 283; *Robertson v. Coleman* (1886) 141 Mass. 231. The same general rules apply to commercial paper. Therefore, if it is the intention of the maker of a check to name a given individual as payee, the bank may safely pay such an one, though he be guilty of obtaining money under false pretences. *Hoge v. First Nat'l Bank* (1886) 18 Ill. 501, but if the impostor is not in fact he whom the maker intended as payee, his indorsement is a forgery and can pass no title to the instrument. 4 COLUMBIA LAW REVIEW 380. The principal case would seem to be controlled by this principle, for the defendant's intention was clearly indicated by the fact that the payees were described by their official titles. While the maker of a check has been held estopped by reason of gross negligence to deny the validity of forged alterations, 2 Daniel, Negot. Ins., (5th ed.) § § 1405, 1406, 1659, it is well settled that his failure to identify the payee is no breach of duty. See *Gallo v. Savings Bank* (1910) 199 N. Y. 222. Accordingly, no estoppel can be predicated upon the facts of the case in question. It would further seem that the bank was put on notice by the defendant's method of describing the payees. *Cf. First Nat'l Bank v. Amer. Exchange Bank* (1902) 170 N. Y. 88.

PARTNERSHIP—LIMITED PARTNERSHIPS—STATUTORY CONSTRUCTION.—The defendants claimed to be a limited partnership. The limited partnership articles had been recorded in the county clerk's office in accordance with the statute, but they were not indexed properly. Apparently the plaintiff had actual knowledge of the terms of the articles. *Held*, the defendants were liable as general partners. *R. S. Oglesby Co. v. Lindsey et al.* (Va. 1911) 72 S. E. 672.

As the purpose of statutes providing for the creation of limited partnerships is to induce capitalists to engage in mercantile pursuits, the tendency is to liberalize the rules of construction for the benefit of special partners. See *White v. Eiseman* (1892) 134 N. Y. 101; *Ulman v. Briggs* (1880) 32 La. Ann. 655, 657; *Burdick, Partnership*, 387, 390. But where the defect would tend to deceive persons dealing with the firm, strict compliance with the statute is required. *Bowen v. Argall* (N. Y. 1840) 24 Wend. 496. For example, he who would escape unlimited liability must show that it is unnecessary to resort to outside inquiry to determine the essential articles of agreement. Otherwise proof of limited liability has failed. *Cummings v. Hayes* (1902) 100 Ill. App. 347. Therefore, unless exemption has been secured either by express stipulation or by estoppel, special members are liable as general partners, however honest their intention may have been, if substantial compliance has not been made with the statute. *Sheble v. Strong* (1889) 128 Pa. 315; *Burdick, Partnership*, 402. Moreover, knowledge that partners hold themselves out as limited partners should not work an estoppel against creditors. *Andrews v. Schott* (1848) 10 Pa. 47, 55; but *cf. Tracy v. Tuffly* (1890) 134 U. S. 206, 226. Hence though in the principal case the plaintiff's rights were apparently not prejudiced by the clerk's failure properly to index the partnership agreement, since the court considered that the omission tendered to mislead parties dealing with the partnership, the defendants were rightly declared general partners. *Cummings v. Hayes supra*; see *Henkel v. Heyman* (1878) 91 Ill. 96; but see *Pres't of Manhattan Co. v. Laimbeer* (1888) 108 N. Y. 578.

POWERS—DEFECTIVE EXECUTION—AID OF EQUITY.—Real property was conveyed in trust for one for life with power in her to dispose of the fee by deed or will. She made a will devising "all my real estate" and died possessed of property other than that subject to the power. *Held*, this was not such an execution of the power as would make the property assets for creditors. *Southern Pine Lumber Co. v. Arnold* (Tex. 1911) 139 S. W. 917. See Notes, p. 161.

PUBLIC SERVICE COMPANIES—TELEGRAPHS AND TELEPHONES—OFFICE HOURS.—An important telegram was received by the defendant company after its office hours, but was not delivered to the addressee until the next day. *Held*, the defendant was not guilty of negligence. *Harrelson v. W. U. Tel. Co.* (S. C. 1911) 72 S. E. 382.

A public service company is not precluded by its duties to the public from prescribing regulations for the conduct of its business. 2 Wyman, Pub. Serv. Corp., § 867. Thus, a telegraph company may designate reasonable office hours after which it can refuse to accept messages for transmission. *Carter v. Tel. Co.* (1906) 141 N. C. 374. But if an important message be accepted by the company after office hours, there is a difference of opinion as to its duty. By some courts the acceptance is regarded as a waiver of its regulations as to hours,

Carter v. Tel. Co. supra, while others hold that the acceptance is subject to these regulations. *Davis v. Tel. Co.* (Ky. 1902) 66 S. W. 17. But even in the latter jurisdictions, if the transmitting operator knows that the office at the place of delivery is closed, he must notify the sender of this, see *Sweet v. Tel. Co.* (1901) 22 R. I. 344, as well as of other expected delays. *Bierhaus v. Tel. Co.* (1893) 8 Ind. App. 246. A more rigorous duty, however, is imposed upon the company by some tribunals, and its failure to give this information to the sender is considered negligent, regardless of the actual knowledge of the operator who accepts the message, *Tel. Co. v. Harris* (1909) 91 Ark. 602; *contra, Tel. Co. v. Neel* (1894) 86 Tex. 368, on the ground that it could easily inform its agents of its rules. Thompson, Electricity, § 300; *Bierhaus v. Tel. Co. supra*; *contra, Given v. Tel. Co.* (1885) 24 Fed. 119. With regard to the office at the point of delivery, there is a corresponding diversity of opinion both as to its duty to receive the message after hours, and to use reasonable means to deliver it if the message has been unconditionally accepted. Cf. *Davis v. Tel. Co.* (1899) 46 W. Va. 48; *Brown v. Tel. Co.* (1889) 6 Utah 219; *Carter v. Tel. Co. supra*. See also *Tel. Co. v. Price* (1910) 137 Ky. 758. It is therefore obvious that the principal case would have been decided differently in many jurisdictions.

QUASI-CONTRACTS—EXECUTION SALE—FAILURE OF TITLE—PURCHASER'S RIGHTS.—Chattels wrongfully attached and sold at execution were relieved from the purchaser by the rightful owner. The purchaser brought action against the judgment creditor for money had and received. *Held*, he could recover. *Dresser v. Kronberg* (Me. 1911) 81 Atl. 487.

A purchaser at an execution sale is in the position of one who buys a mere chance, *Griffith v. Fowler* (1846) 18 Vt. 390; see *Weidler v. Farmers' Bank* (Pa. 1824) 11 S. & R. 134, 139, and it is therefore doubtful if the plaintiff bought under a mistake of fact. Furthermore, recovery for money paid under mistake is based upon the unjust enrichment of the defendant. Accordingly, if the defendant has received money in good faith and in satisfaction of a valid claim, he may conscientiously keep it notwithstanding the plaintiff's mistake as to some collateral fact. *Merchants' Ins. Co. v. Abbott* (1881) 131 Mass. 397; Keener, Quasi-Contracts, 77-85. This principle seems fully applicable to the principal case, for the defendant merely obtained in the method prescribed by law that which was due him in satisfaction of a valid judgment. *M'Ghee v. Ellis* (Ky. 1823) 4 Litt. 245; *England v. Clark* (1843) 5 Ill. 486. Obviously the failure of title was insufficient in itself to create a claim against the defendant, had he been the plaintiff's vendor, for the sale was without warranty, and without it there is no basis for an action for money had and received. Keener, Quasi-Contracts, 125-129. The judgment debtor, on the contrary, was relieved of his debt without cost. It would therefore seem that an action for money paid to his use would lie against him at the suit of the purchaser, Keener, Quasi-Contracts, 396; but see *Hawkins v. Miller* (1866) 26 Ind. 173, whose equity is recognized by the decisions which accord him subrogation to the rights of the creditor against the judgment debtor. *M'Ghee v. Ellis supra*. By statute in a few States relief is afforded the purchaser against the debtor, N. C. Revisal § 639, or creditor. Code of Iowa § 4034.

SALES—CONDITIONAL SALE—RECOVERY OF POSSESSION BY VENDOR—DESTRUCTION OF PROPERTY.—The defendant defaulted in the payment of the price of a piano bought from the plaintiff under a conditional sale. The plaintiff brought replevin and upon the defendant's failure to give bond gained possession of the chattel, which was thereafter accidentally destroyed, prior to final judgment in the replevin suit. *Held*, one judge dissenting, the plaintiff could recover the purchase price. *Hollenberg Music Co. v. Barron* (Ark. 1911) 140 S. W. 582.

The purchaser's obligation in a conditional sale is not conditioned upon the seller's ability to give title upon final payment, but the possession of the property and the right to the legal title constitute the consideration for his promise, which is absolute. *Burnley v. Tufts* (1888) 66 Miss. 48; *LaValley v. Ravenna* (1905) 78 Vt. 152. The vendee is in fact the real owner of the chattel, *Engine Co. v. Hall* (1889) 89 Ala. 628, which he may sell or mortgage, *Day v. Bassett* (1869) 102 Mass. 445; *Carpenter v. Scott* (1881) 13 R. I. 477, subject only to the vendor's right to assert upon default the title which he has reserved as security. *Planters' Bank v. Vanduyck* (Tenn. 1871) 4 Heisk. 617; *Phillips v. Hollenberg Music Co.* (1907) 82 Ark. 9. Therefore, it is generally held that the loss falls on the buyer when the property is accidentally destroyed while in his possession. *Burnley v. Tufts supra*; *LaValley v. Ravenna supra*; *contra*, *Bishop v. Minderhout* (1900) 128 Ala. 162. Moreover, it does not seem that the liability of the vendee is necessarily changed by the vendor's retaking the property, for although the exercise of his right to do so is generally considered an election to rescind the contract, precluding him thereafter from an action for the purchase price, *Green v. Sinker* (1893) 135 Ind. 434; *Perkins v. Grobben* (1898) 116 Mich. 172, the result should be different if the vendor demands possession of the goods, not as his own, but as a means of enforcing his security. *Tufts v. D'Arcambal* (1891) 85 Mich. 185; *Dederick v. Wolfe* (1891) 68 Miss. 500. The plaintiff's action in the principal case was interpreted by the court to be for the latter purpose. It therefore follows that it was in a position similar to that of a chattel mortgagee in possession, and the property having been accidentally destroyed, the loss fell upon the defendant. See *Covell v. Dolloff* (1850) 31 Me. 104.

SALES—CONDITIONAL SALES—RIGHTS OF CREDITORS OF VENDEE.—The plaintiff sold goods giving the vendee the privilege of re-sale, but reserving title until payment. The defendant, the vendee's creditor, attached the property for a debt existing at the time of sale. *Held*, the vendor was not estopped to assert his title. *Flint Wagon Works v. Maloney* (Del. 1911) 81 Atl. 502.

Conditional sales are almost universally upheld as between the parties. *Benjamin, Sales*, (7th Amer. ed.) 298 n. 4. Although the opportunity for fraud which they afford has led to numerous statutes requiring their registration to give them validity against third parties, *Williston, Sales*, § 327, yet in the absence of such statutes, the vendor may generally assert his title both against *bona fide* purchasers, *Heinbockle v. Zugbaum* (1885) 5 Mont. 345; *Marvin Safe Co. v. Norton* (N. J. 1886) 57 Am. Rep. 566, and against creditors of the vendee. *Hamway v. Wright* (1862) 18 Ind. 377; *contra*, *Murch v. Wright* (1868) 46 Ill. 487. And, except in a few States, *In Re Gillian* (1906) 152 Fed. 605; *Mfg. Co. v. Nordeman* (1906) 118 Tenn. 385, the validity of the transaction will not be impaired if the vendee is

authorized to re-sell. *In Re Newton* (1907) 153 Fed. 841. It is frequently held, however, that though the vendee sells in excess of his authority, the vendor will be estopped to deny the title of a *bona fide* purchaser. 11 COLUMBIA LAW REVIEW 385. But since the purchaser is ignorant of the authority given, this in itself cannot be the basis of the estoppel. The true explanation would seem to be that the vendor, by authorizing the vendee to assume possession under certain circumstances, as where the latter is a retail dealer and buys to replenish his stock, has held out the vendee as the owner, and the authority to sell is important chiefly as showing the vendor's intention. While it is arguable that the vendor should also be estopped to assert his title against the vendee's creditors who rely on his ostensible ownership of the goods, but see *Hirsch v. Steele* (1894) 10 Utah 18; *Lewis v. McCabe* (1881) 49 Conn. 44, it is clear that there is no basis for an estoppel where, as in the principal case, the credit is extended before the sale is made. See *King v. Wilkins* (1858) 11 Ind. 347.

SPECIFIC PERFORMANCE—EQUITABLE CONVERSION—OPTION TO PURCHASE.—A lessor gave his lessee an option to purchase the fee, which was exercised after the former's death, notice being served on his administratrix. Specific enforcement was resisted on the ground that notice should have been served on the heirs. The plaintiffs contended that as the exercise of the option worked an equitable conversion from the date of the lease, the lessor's personal representative was the proper party to notify. *Held*, this contention was unsound. *Rockland-Rockport Lime Co. v. Leary* (N. Y. Ct. of Appeals, Dec. 12, 1911). Not yet reported. See Notes, p. 155.

STATUTES—CONSTRUCTION—EVIDENCE OF THE MEANING OF WORDS.—In interpreting the language used in a statute, testimony as to the meaning of a word was excluded. *Held*, since such evidence was inadmissible, its exclusion constituted no error. *Sullivan v. Boston & A. R. R.* (Mass. 1911) 96 N. E. 347.

In accordance with the rule for the construction of a written instrument, it has been universally held that the interpretation of a statute presents a problem which the court must decide, under its function of administering the law of the forum. *Comw. v. Anthes* (Mass. 1855) 5 Gray 185; *Bedenbaugh v. So. Ry.* (1903) 69 S. C. 1. In other written instruments, such as deeds and wills, evidence of usage may be received to explain the meaning of words employed in a technical sense. *Brown v. Brown* (Mass. 1844) 8 Met. 573; *Hamilton v. Liverpool etc. Ins. Co.* (1889) 136 U. S. 242. Moreover, in determining the meaning of words contained in a statute, the court may inform itself at its discretion by reference to various sources of information. *State v. Stevens* (1897) 69 Vt. 411; *Hockett v. State* (1885) 105 Ind. 250; *Comw. v. Marzynski* (1889) 149 Mass. 68. While it has been held that the testimony of the legislators themselves is inadmissible to prove their intent, since the opinion of an individual legislator is not necessarily that of the legislature, which must therefore be determined from the language used, *U. S. v. Freight Ass'n* (1896) 166 U. S. 290; *Northern Trust Co. v. Snyder* (1902) 113 Wis. 516, the admission of testimony as to the meaning of words would seem to be a matter within the discretion of the court, *Redell v. Moore* (1901) 63 Neb. 219, and therefore its exclusion is clearly not reversible error.

The more rigid rule suggested by the court in the principal case, that such evidence is inadmissible, seems unfortunate in view of the apparent desirability of its admission in many cases.

TRUSTS—ASSIGNMENT OF CESTUI'S INTEREST—SUBSEQUENT PURCHASE BY THE TRUSTEE.—A trustee of real estate for himself and two others allowed one of his associates to sell his interest to an innocent third party for much less than its true value, and soon afterwards bought it in himself. *Held*, the situation constituted a partnership and the trustee's purchase was still impressed with the trust, because of the fiduciary relation existing between partners. *Yost v. Critcher* (Va. 1911) 72 S. E. 594. See Notes, p. 156.

WITNESSES—ATTESTATION OF WILLS—DISQUALIFYING INTEREST.—The testatrix provided for the establishment of a charity and named one of the attesting witnesses as a member of the executive committee which was to carry out her wishes. *Held*, one judge dissenting, since the witness was incompetent, the will was void. *In re Stinson's Estate* (Pa. 1911) 81 Atl. 207.

The common law disability of a witness to testify because of "interest" has not been removed in the case of attesting witnesses. Where the witness is interested at the time of attestation he is incompetent to testify at the probate of the will, though the interest has in the interim ceased to exist, either because it depended on a contingency which has not happened, *Castine Church, Appellant* (1898) 91 Me. 416, or by virtue of an express release by the witness. *Fisher v. Spence* (1894) 150 Ill. 253; but see *Wyndam v. Chetwynd* (1757) 1 W. Bl. 95. Where the interest is very remote, such as that which an inhabitant of a town has in a devise for the erection of a school therein, *Piper v. Moulton* (1881) 72 Me. 155, or that which a member of a society or a pew holder of a church has in a devise thereto, *Hawes v. Humphreys* (Mass. 1830) 9 Pick. 350, the witness is not disqualified. Where the services of an executor are gratuitous, as in England, he is competent to prove the will appointing him, see *Bettison v. Bromley* (1810) 12 East 250, and the prevailing doctrine is that even though he is entitled to commissions, the latter are not of a nature to disqualify him, either because they are considered as constituting no substantial interest, *Richardson v. Richardson* (1862) 35 Vt. 238; *Stewart v. Harriman* (1875) 56 N. H. 25, or else as too remote. *Snyder v. Bull* (1851) 17 Pa. 54; *contra*, *Taylor v. Taylor* (S. C. 1845) 1 Rich. L. 531; *Morton v. Ingram* (N. C. 1850) 11 Ired. L. 366. For the same reasons it would seem that the witness in the principal case was competent, for her interest was no larger than that of a trustee or an executor. *Cf. Loring v. Park* (Mass. 1856) 7 Gray 42. The decision is to be explained by a peculiar statute which is construed to require a broader test of interest in the case of bequests to charities. See *Kessler's Estate* (1908) 221 Pa. 314.

WITNESSES—TESTIMONY AT A FORMER TRIAL—IMPEACHMENT BY SUBSEQUENT STATEMENTS.—The plaintiff reproduced testimony given at a former trial on proof that the witness was beyond the jurisdiction. The defendant sought to impeach this testimony by introducing an *ex parte* affidavit, made by the witness after the former trial, contradicting his testimony. *Held*, the affidavit was inadmissible. *Baker v. Sands* (Tex. 1911) 140 S. W. 520.

The rule first enunciated in *The Queen's Case* (1820) 2 Brod. & B. 284, 299, 311, that in order to impeach a witness by introducing evidence of statements made by him which contradict his testimony, a foundation must first be laid in his cross-examination, generally obtains. *Mattox v. U. S.* (1895) 156 U. S. 237; *contra*, *Tucker v. Welsh* (1821) 17 Mass. 160. It is considered unfair to surprise the witness and he must therefore be given an opportunity for correction or explanation. *Kimball v. Davis* (N. Y. 1838) 19 Wend. 437. If the witness is dead or absent from the jurisdiction a predicate for such impeaching evidence is generally deemed equally indispensable. Otherwise sworn testimony tested by cross-examination might be destroyed by hearsay, thus creating the temptation to fabricate contradictory statements. *Craft v. Comw.* (1883) 81 Ky. 250. Nor does one party suffer greater hardship through its exclusion than its admission would cause the other, since the latter may no longer re-examine his witness. *Runyan v. Price* (1864) 15 Oh. St. 1. These considerations lose much of their force, however, when applied to evidence, such as dying declarations, which has not been tested by cross-examination, and the rule is less rigorously applied in such cases. *Carver v. U. S.* (1897) 164 U. S. 694. But the facts of the principal case do not call for an exception to the rule, and it seems fair that the impeacher in such a case be required at least to attempt to secure the deposition of the absent witness in order to lay a predicate for his evidence. *Stacy v. Graham* (1856) 14 N. Y. 492, 498; *Johnson v. Kinsey* (1849) 7 Ga. 428. But since the requirement is but a rule of practice, see *Hedge v. Clapp* (1853) 22 Conn. 262, the trial court should have a discretion to dispense with it, if the impeacher has been vigilant and its application would cause unusual hardship. *Walden v. Finch* (1872) 70 Pa. 460; see 2 Wigmore, Evidence, §§ 1031, 1032.